

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF TEXAS (HOUSTON)

IN RE: . Case No. 23-90731  
. Chapter 11  
. (Jointly Administered)  
SURGALIGN HOLDINGS, INC., .  
et al., . 515 Rusk Street  
. Houston, TX 77002  
Debtors. .  
. Thursday, August 10, 2023  
. 4:21 p.m.  
. . . . .

TRANSCRIPT OF ORDER (I) AUTHORIZING AND APPROVING THE SALE OF  
CERTAIN OF THE DEBTORS' DIGITAL HEALTH BUSINESS ASSETS TO  
AUGMEDICS, INC. FREE AND CLEAR OF ALL LIENS, CLAIMS,  
ENCUMBRANCES, AND INTERESTS; (II) AUTHORIZING THE SALE  
TRANSACTION; AND (III) GRANTING RELATED RELIEF [338]  
BEFORE THE HONORABLE CHRISTOPHER M. LOPEZ  
UNITED STATES BANKRUPTCY COURT JUDGE

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JAMES GARRETT, ESQ.

KEVIN HYKES

JEFF WETHERITE

GEORGE VARUGHESE



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FOR THE DEBTORS:DIRECTCROSSREDIRECTRECROSS

George Varughese

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EXHIBITSADMITTED

ECF Numbers 334-9 and 334-10

10



1 (Proceedings commence at 4:21 p.m.)

2 THE COURT: Okay. Good afternoon, everyone. This is  
3 Judge Lopez. Today is August the 10th. I'm going to call  
4 Surgalign, 23-90731, continuation of a sale hearing. There's  
5 about -- now, the courtroom is empty, but there's about -- a  
6 little over 60 people on the line. I'm just going -- I'm going  
7 to start to -- a number of parties have hit "five star".  
8 Again, I'm going to ask that you please make an electronic  
9 appearance, and we'll see where this goes. I'm just going to  
10 unmute the line in the order in which I see them. First is a  
11 646 number.

12 MR. VARUGHESE: Your Honor, can you hear me?

13 THE COURT: Just fine.

14 MR. VARUGHESE: Okay. This is George Varughese,  
15 Alvarez & Marsal.

16 THE COURT: Okay. Good afternoon, sir.

17 Here's a 330 number.

18 MR. WITHERITE: Jeff Witherite, Surgical Theater.

19 THE COURT: Good. Okay. Good afternoon, sir.

20 310 number?

21 MR. WITHERITE: Thank you.

22 THE COURT: Mr. Schultz, that -- there's a 310 with a  
23 4 number in there. You may have muted.

24 MR. SCHULTZ: Yes, I apologize. It should be okay  
25 now, Your Honor.



1 THE COURT: Just fine.

2 MR. SCHULTZ: Nathan Schultz on behalf of Augmedics,  
3 Inc. Also with us on the line are the CEO, Kevin Hykes and the  
4 outside general counsel, James Garrett.

5 THE COURT: Okay. The reason I knew this I do it all  
6 the time. Hold on.

7 617 number?

8 MR. BILOWZ: Good afternoon, Your Honor. Peter  
9 Bilowz on behalf of SNH Medical Office Properties Trust.

10 THE COURT: Okay. A 312 number?

11 MR. PESCE: Good afternoon, Your Honor. Gregory  
12 Pesce, White & Case, on behalf of the debtors.

13 THE COURT: Good afternoon.

14 Alrighty, the 917 number?

15 MR. FEINSTEIN:: Good afternoon, Your Honor. Robert  
16 Feinstein, Pachulski Stang Ziehl & Jones, proposed counsel for  
17 the Committee.

18 THE COURT: Alrighty. 914 number?

19 MR. HERSHEY: Good afternoon, Your Honor. Sam  
20 Hershey from White & Case for the debtors.

21 THE COURT: Alrighty. 832 number? Good afternoon.

22 MR. MARTIN: Good afternoon, Your Honor. Jarrod  
23 Martin on behalf of Surgical Theater. Also with me is my  
24 co-counsel Michael O'Neil and Jeff Witherite, the Surgical  
25 Theater corporate representative.



1 THE COURT: Okay. Good afternoon, Mr. Martin.

2 MR. MARTIN: Good afternoon.

3 THE COURT: 631 number?

4 MS. POLNICK: Good afternoon, Your Honor. Veronica  
5 Polnick, appearing on behalf of the debtors.

6 THE COURT: Okay. Good afternoon, Ms. Polnick.

7 Anyone else, please hit "five star." I'm going to  
8 kind of do a going once, going twice, and then I'm going to  
9 turn it over to debtors' counsel.

10 Okay. I'm turning it over to debtors' counsel.

11 MR. PESCE: Thank you, Your Honor. Again, Gregory  
12 Pesce, White & Case, proposed counsel to the debtors. We  
13 appreciate Your Honor making a time for us this afternoon for  
14 the continued sale hearing for the debtors' digital assets.

15 Just rewinding the tape here a little bit, going into  
16 our prior hearing, the debtors were seeking to approve a post-  
17 auction bid that we received from Surgical Theater. As we  
18 talked -- discussed in our reply that we filed earlier today,  
19 and at Docket 336, we believe that under the fiduciary-out, it  
20 was permissible and appropriate for us to proceed -- to pursue  
21 that bid. But the debtors also take to heart the Court's  
22 comments at the hearing.

23 And this is a case that's somewhat unusual in that we  
24 don't have any secured creditors. We only have our creditors'  
25 committee. And after the hearing, we discussed the matter at



1 length with our committee to obtain their feedback. And we  
2 also engaged with our prior lead bidder, Augmedics.

3 And as a result of all those conversations, Augmedics  
4 confirmed to the debtors, importantly, that they would stand by  
5 a proposed bid of \$1.5 million in cash. They also completed  
6 some remaining ancillary documents which had not yet been  
7 completed as of the sale hearing. With those developments  
8 having occurred, and with our committee supporting the  
9 decision, the debtors determined that, in lieu of continued  
10 litigation with Augmedics over the bid, that we would pivot  
11 back to Augmedics in light of its improved offer and seek to  
12 approve that proposal at today's hearing. After making that  
13 determination, we informed Mr. Martin and Mr. Martin's clients  
14 of that decision. As Your Honor may have seen earlier today,  
15 as we briefly touched upon in our reply, Mr. Martin's clients  
16 filed on the docket a further modified bid of \$2 million.

17 And you know, while the debtors are sort of paying to  
18 be in a position like this, we've conducted a very broad,  
19 robust process. That process led us to Augmedics, and we  
20 subsequently were able to further enhance that proposal. And  
21 we believe very strongly that that process was very -- was  
22 sound and robust. And with -- in consultation with the  
23 Committee, we understand the Committee's preference is for us  
24 to proceed with the existing Augmedics bid and bring this  
25 matter to closure.



1           So for the rest of today's hearing, the principal  
2 thing that we're going to do is we're going to present  
3 Mr. Varughese as our witness in support of the Augmedics bid,  
4 to talk about the sale process that led to us -- led to the  
5 auction and then the subsequent developments there. And then,  
6 to the extent there are any actual objections, we can discuss  
7 that in argument afterwards.

8           I think the only lantern I might hang here for the  
9 Court is that prior to today's hearing, we finalized the APA  
10 and the ancillary documents that are expressly contemplated by  
11 the purchase agreement with Augmedics to our satisfaction and  
12 the Committee's satisfaction. Earlier today, it became clear  
13 that Augmedics may need some transition services from the  
14 debtors through approximately September 15th. We have not yet  
15 signed a transition services agreement with Augmedics, and the  
16 debtors don't believe that a transition services agreement  
17 necessarily has to be finalized prior to the closing.

18           We believe we can meet our obligations to Augmedics  
19 under the purchase agreement at the closing. All that being  
20 said, we may be before Your Honor in the not too distant future  
21 to seek approval of a transition services agreement if  
22 Augmedics continues to require those services.

23           Most importantly, we just want to -- in addition to  
24 making sure the sale happens, we want to make sure that, if  
25 Augmedics does require any services, the debtors are going to





1 be reimbursed and compensated for those services; and to the  
2 extent any employees who are not currently being retained by  
3 the debtors under the KERP program Your Honor approved that we  
4 deal with that contingency. That's a long way of saying that  
5 that is not a matter for today. But I just want to put that on  
6 the Court's radar that this may be something that we seek  
7 approval for in the not-too-distant future. But given that it  
8 just came up today, it's not something we're doing today.

9 And to be clear, it is not required by our purchase  
10 agreement. The debtors are ready to close as soon as possible  
11 after the sale hearing with Augmedics transaction. And that --  
12 that's really something that's sort of a -- for the future, if  
13 need be.

14 So with that, I'm going to -- I plan to hand it to my  
15 partner, Sam Hershey, who's going to present Mr. Varughese from  
16 A&M, who is the lead investment banker for Alvarez & Marsal, to  
17 pursue -- or to provide a -- direct testimony and the extent  
18 any parties wish to cross examine him or the Court has  
19 questions, he'll obviously entertain and answer those  
20 questions.

21 So before handing it -- the virtual podium to  
22 Mr. Hershey, I'll pause and see if Your Honor has any questions  
23 or requests that we proceed.

24 THE COURT: Nope, no questions. I think today -- and  
25 I appreciate the update. I think today we said we were going



1 to get right into it, so let's do.

2 MR. HERSHEY: Great.

3 THE COURT: All right. Mr. --

4 MR. HERSHEY: Good afternoon, Your Honor.

5 THE COURT: Mr. Hershey, I just -- perfect.

6 MR. HERSHEY: Oh, sorry, Your Honor.

7 THE COURT: No, no, I can hear you just fine. I just  
8 wanted to confirm that I could hear you. Okay.

9 MR. HERSHEY: Great.

10 THE COURT: How do you wish to proceed, Counsel?

11 MR. HERSHEY: Thank you, Your Honor. Sam Hershey  
12 from White & Case for the debtors.

13 So, Your Honor, before I call Mr. Varughese to the  
14 stand, I do want to note that at the last hearing, we admitted  
15 eight exhibits into evidence. Those are at Docket Number 317,  
16 1 through 8. Earlier today, we filed an amended exhibit list  
17 that includes two additional exhibits. Those are at Docket  
18 Number 334-9 and -10. And so I'd like to move those two  
19 documents into evidence before calling the witness, if I may.

20 THE COURT: Any objection?

21 Okay. They're admitted.

22 (ECF Numbers 334-9 and 334-10 admitted into evidence)

23 MR. HERSHEY: Thank you, Your Honor. With that, the  
24 debtors would request to call Mr. Varughese to the stand.

25 THE COURT: Okay. Mr. Varughese, can you raise your



1 right hand, sir?

2 GEORGE VARUGHESE, DEBTORS' WITNESS, SWORN

3 THE COURT: Okay. I'm going to ask just to confirm  
4 that you have no notes in front of you, and if any documents  
5 are shown, we'll put them up on the screen so that you can see  
6 them, we can all see it at the same time. Is that okay?

7 THE WITNESS: That -- that's okay. I do have notes  
8 in front of me, but I will not look at them. Thank you.

9 THE COURT: Okay. I want you to put them -- just put  
10 them to the side so that you're -- we're all comfortable.

11 THE WITNESS: Yes.

12 THE COURT: And I would also note that parties may,  
13 you know, object, and I would just ask that you give me an  
14 opportunity to resolve the objection. Okay?

15 THE WITNESS: Thank you.

16 THE COURT: Mr. Hershey, you may proceed.

17 MR. HERSHEY: Thank you, Your Honor.

18 DIRECT EXAMINATION

19 BY MR. HERSHEY:

20 Q Mr. Varughese, good afternoon. Welcome back to the  
21 witness stand.

22 A Good afternoon.

23 Q Now, Mr. Varughese, at the last hearing, you testified  
24 regarding the marketing and sale process in connection with the  
25 debtors' hardware assets. I want to turn now to the digital



1 assets. Can you describe the marketing process in connection  
2 with those assets?

3 THE WITNESS: Your Honor, I am hearing some  
4 background noise.

5 THE COURT: Yeah, I found who it was. Mr. Hershey,  
6 can you still -- I want to make sure I didn't mute you by  
7 accident. Oh, I think I did. Darn, it. Hit "five star"  
8 again, Mr. Hershey.

9 THE WITNESS: Okay. Thank you.

10 THE COURT: Just a second. Hold on a second,  
11 Mr. Varughese. Hold on a second, I got it.

12 THE WITNESS: Oh, I'm sorry.

13 THE COURT: I was hearing some back noise as well,  
14 and I thought I caught the right back noise party, but I  
15 didn't. I think I muted your lawyer. You're not going to be  
16 able to answer any questions.

17 Alrighty, folks, again, we're still conducting live  
18 court. Thank you. I apologize.

19 Mr. Hershey, why don't you ask the question again so  
20 we can have a clean record?

21 MR. HERSHEY: Of course. Can Your Honor hear me  
22 okay?

23 THE COURT: Just -- yes. Now, I can. And I know who  
24 you are.

25 MR. HERSHEY: Perfect.



1 THE COURT: On this line again, so and I --

2 MR. HERSHEY: Excellent. Thank you, Your Honor.

3 BY MR. HERSHEY:

4 Q So, Mr. Varughese, at the last hearing, you described in  
5 your testimony the marketing and sale process in connection  
6 with the debtors' hardware assets. I want to turn now to the  
7 digital assets of the debtors. Can you describe the marketing  
8 process in connection with those assets?

9 A Yes. For context, as Mr. Pesce observed last time, I just  
10 want to make sure that everybody's aware, the digital assets is  
11 a pre-revenue business. It's largely based on some artificial  
12 intelligence technology. It is losing money, and by our  
13 estimate, it requires another \$30 million or so to get it to a  
14 break-even status. So, given those features of the business,  
15 we did not emphasize the marketing of this before the filing of  
16 the bankruptcy to find a stalking horse. As everybody knows,  
17 we found Xtant for the hardware assets.

18 And once we filed the bankruptcy, we then -- we then  
19 proceeded -- we then proceeded to start the marketing for the  
20 digital assets. We developed a buyer list, which consisted of  
21 several different types of buyers: private equity firms,  
22 venture capital firms, portfolio companies of private equity  
23 firms, and strategic companies, strategic partners who are  
24 already in the -- in the business. We then consulted with the  
25 management team of the company, and they had several comments



1 which we incorporated. We also consulted with the financial  
2 advisor to the unsecured creditor committee, who also had some  
3 comments, which we incorporated. In all, we had a list of over  
4 515 parties.

5 And I do want to make one point here: Some of these were  
6 parties who were also interested in the hardware. So it's  
7 difficult to unbundle those, given that both the hardware and  
8 the digital really work with the same type of -- same type of  
9 business. So what I'm talking about is a -- is a list that  
10 might encompass people who also had an interest in the  
11 hardware.

12 So over 550 parties that were contacted. Eventually, 11  
13 parties signed an NDA who had an interest just in the digital  
14 assets. We get them -- got them into the data room, answered  
15 their questions. And at the end of the day, at the deadline  
16 for the bid, two bids were received, one from Brainlab at  
17 \$150,000 and one from Augmedics at \$250,000.

18 Q Thank you. And what happened at the debtors' auction with  
19 respect to the digital assets?

20 A So we started the auction with the -- the two parties I  
21 mentioned, Brainlab and Augmedics. We started with the  
22 Augmedics bid of \$250,000, and in increments of \$50,000. There  
23 were multiple rounds. Eventually, the final bid was from  
24 Augmedics at \$900,000, so we declared them the winner of the  
25 auction at that price, and we declared Brainlab as the backup



1 bidder at \$850,000.

2 Q Now, as the Court is aware from the last hearing,  
3 following the auction, another bidder called Surgical Theater  
4 came forward with a topping bid of \$1.5 million. Was Surgical  
5 Theater one of the parties that A&M contacted in connection  
6 with the debtors -- with marketing the debtors' digital assets?

7 A No.

8 Q Why not?

9 A Well, Surgical Theater is a small company. It is a  
10 private company. I understand it has revenues of less than  
11 \$50 million. It's a company that we had not heard of before, a  
12 company that management had not heard of before, and it's also  
13 one that the advisors to the UCC had not heard of before. I do  
14 know that they're attending the hearing, and I want to  
15 emphasize that there was no disrespect intended, but in --  
16 sometimes in large processes like this, some small companies do  
17 get missed, and that was the reason.

18 Q And I -- you sort of hinted at this in your last answer,  
19 but I just want to be really clear for the Court: To your  
20 knowledge, did anyone from the debtors or their advisors  
21 contact Surgical Theater regarding the sale of the debtors'  
22 digital assets?

23 A No.

24 Q Okay. So by the time Surgical Theater came forward, the  
25 debtors already had a winning bid at auction from Augmedics.



1 What made you believe that you could engage with Surgical  
2 Theater regarding a potential topping bid?

3 A Well, this -- this was a difficult issue for us because we  
4 had a lot of discussion between us and White & Case and the  
5 management. On the one hand, there was the sanctity of the  
6 process. We -- there was an auction, there was a winner, and  
7 they played by the rules, and -- and that was that. On the  
8 other hand, we felt that we had a fiduciary responsibility to  
9 maximize the value of the assets and maximize the recovery for  
10 the creditors.

11 When -- after multiple conversations with Surgical Theater  
12 when they approached us, we determined that that -- they had  
13 the financial capacity and the skill set to make a bid that  
14 would be a meaningful improvement over the Augmedics' winning  
15 bid. And we felt we had no choice but to listen to them and  
16 entertain their bid.

17 Q And in addition to the duties you're describing, did you  
18 believe that you had the right, under the rules provided by the  
19 Court, to consider that bid?

20 A We did, yes.

21 Q Okay. So let me actually -- I'd like to turn your  
22 attention to Committee Exhibit Number 5, which is at  
23 Docket Number 317-5

24 MR. HERSHEY: And if I may, I'd like to ask the Court  
25 to give presenter rights to Ms. Polnick, who will pull this up





1 for the witness to see.

2 THE COURT: Alrighty.

3 UNIDENTIFIED: I'm sorry. Counsel said that's a  
4 committee exhibit or is it a debtor exhibit?

5 MR. HERSHEY: I'm sorry. Debtor exhibit.

6 UNIDENTIFIED: Thank you.

7 MR. HERSHEY: I -- I'm in judge -- I'm in front of  
8 Judge Lopez in another case where I represent the committee, so  
9 I had a momentary confusion there. Yes, debtor exhibit. Thank  
10 you.

11 Okay. And actually, Ms. Polnick, why don't we just  
12 go to the top first, just so I can make sure Mr. Varughese has  
13 seen this document before. Okay.

14 BY MR. HERSHEY:

15 Q So, Mr. Varughese, take a second and look at this. And  
16 then if you could let me know if you've seen this document  
17 before.

18 A I have.

19 Q Have you reviewed it?

20 A Yes.

21 Q Okay.

22 MR. HERSHEY: So now we can go, Ms. Polnick, to PDF,  
23 Page 35. And can we actually -- can we zoom in a bit on 17?  
24 Thank you very much. Okay.

25 BY MR. HERSHEY:



1 Q Mr. Varughese, you see Section 17 here?

2 A Yes.

3 Q And you see the title of the section is "Fiduciary  
4 Duties"?

5 A Yes.

6 Q Okay. so I'm just going to read this for you and read it  
7 into the record. "Notwithstanding anything to the contrary in  
8 these bid procedures, nothing in these bid procedures shall  
9 require the debtors, after consulting with counsel, to take any  
10 action or refrain from taking any action with respect to any  
11 potential transaction, if taking or failing to take such action  
12 would be inconsistent with applicable law or their fiduciary  
13 duties." Do you see that?

14 A Yes, I do.

15 Q And you see that the next line says, "The debtors maintain  
16 their right to exercise their fiduciary-out at any time prior  
17 to the entry of the sale order". See that?

18 A I do.

19 Q Okay. Mr. Varughese, are these two sentences consistent  
20 with what your understanding was of the debtors' fiduciary-out  
21 that you mentioned in your testimony?

22 A It is.

23 Q Okay.

24 MR. HERSHEY: Thank you, Ms. Polnick. We can take it  
25 down.



1 BY MR. HERSHEY:

2 Q Okay. Mr. Varughese, let's fast-forward to today. The  
3 Court is aware, of course, that the last hearing, Augmedics,  
4 agreed to raise its bid to \$1.5 million. What, if anything,  
5 has Surgical Theater done since the last hearing?

6 A So as the Court is aware, in one of the breaks that was  
7 taken at the last hearing, Surgical Theater indicated that --  
8 that they would be willing to move their bid up to  
9 \$1.65 million. And then yesterday, they let -- informed us  
10 that that -- they would be improving the bid further, to  
11 \$2 million.

12 Q And -- okay. So just -- I just want to make sure it's  
13 crystal clear for the record, so am I correct in understanding  
14 the debtors now have two bids for their digital assets? They  
15 have one bid from Augmedics for \$1.5 million and one bid from  
16 Surgical Theater for \$2 million. Is that correct?

17 A Correct.

18 Q Was there any other component to either party's bids  
19 that's worth raising to the Court's attention?

20 A Yes. Surgical Theater had -- had said that that -- they'd  
21 be willing to take at least three employees, and maybe more, of  
22 the company's digital business.

23 Q Okay. So with those two bids before it, which bid is the  
24 company moving forward with -- or seeking to move forward with  
25 today?



1 A We are seeking to move forward with the bid from Augmedics  
2 at \$1.5 million.

3 Q And why is the company seeking to move forward with that  
4 bid?

5 A So this also has been a difficult question. Several  
6 things influenced our decision on this. First and foremost, as  
7 Mr. Pesce pointed out in his opening comments, there is no  
8 secured debt here. All that we are doing here in maximizing  
9 value is for the benefit of the unsecured creditors.

10 And I -- I believe Mr. Feinstein was -- was -- was  
11 speaking at the last hearing. Our interpretation of that was  
12 that he was not banging the table to tell us that -- that you  
13 got to go get the last dollar or the highest bid. So that was  
14 one thing that influenced us.

15 The second is, Your Honor, we -- we heard you clearly.  
16 You clearly put a premium on the value of the sanctity of the  
17 process, the integrity of the process, and that was very clear  
18 to us.

19 And the third thing is, this is a small company. We are  
20 losing money every day. We are eroding our cash. And this --  
21 this hearing and other things are very expensive. We really  
22 want to get to a conclusion quickly and move on. So our  
23 feeling, after thinking about all of these, is that -- the --  
24 the best and the experienced solution here is to move forward  
25 with the Augmedics bid of \$1.5 million.



1 MR. HERSHEY: Thank you, Mr. Varughese.

2 I have no further questions, Your Honor.

3 THE COURT: Okay. Let me ask, does anyone who  
4 supports the relief requested wish to ask this witness any  
5 questions? And again, if you need to hit "five star", I'm just  
6 checking now.

7 Okay. Anyone wish to cross-examine the witness?  
8 Again, if you wish to ask questions or if you need me, just  
9 please hit "five star".

10 Okay. Alrighty. Thank you.

11 THE WITNESS: Thank you, Your Honor.

12 (Witness excused)

13 THE COURT: Okay. Anyone else?

14 Mr. Hershey, I think it's probably best for me to  
15 turn it back over to you.

16 MR. HERSHEY: Thank you, Your Honor. The debtors  
17 have no further witnesses or evidence, and so we will rest. I  
18 don't know if any other party wishes to submit evidence or a --

19 THE COURT: Okay. Let me -- let's find out: Does  
20 anyone who supports the relief requested have any additional  
21 evidence they wish to present to the Court?

22 Okay. Does anyone who opposes the relief requested  
23 or -- wish to address the Court or present any evidence?

24 MR. MARTIN: Your Honor, this is Jarrod Martin for  
25 Surgical Theater.



1 THE COURT: Yes, sir?

2 MR. MARTIN: I'm kind of in an interesting spot  
3 because my clients neither supporting the relief requested nor  
4 objecting to the relief requested. And in fact, I'm not  
5 certain we have standing to object to a sale when we're not a  
6 creditor.

7 But that being said, I did want to let the Court know  
8 that to the extent the Court has any questions specifically for  
9 Mr. Witherite, he's available. The Court made some comments at  
10 the last hearing that he was -- that you were concerned about  
11 what Mr. Witherite knew or didn't know. And I didn't want the  
12 Court to think we were trying to hide him as a witness. So  
13 he's still available to the extent the Court has any questions.

14 But I am not -- I have no burden of proof in this  
15 hearing. I have no case in chief to put on. And so I'm not  
16 presenting him as a witness, but he is available to the Court  
17 for questions.

18 THE COURT: Perfect. Thank you very much.

19 MR. MARTIN: Thank you, Judge.

20 THE COURT: Okay. Anyone else?

21 Okay. Mr. Hershey and Mr. Pesce, maybe I turn things  
22 back over to you.

23 MR. PESCE: Thank you. For the record, Gregory  
24 Pesce, White & Case, proposed counsel to the debtors. The --  
25 with the evidence closed, I'll just make a few final comments



1 here because I'm pleased to see that there's no objections that  
2 have been filed, and I'm not aware of any objections to the  
3 sale.

4 So maybe just quickly, in summary here, the debtors,  
5 as we talked about at the first hearing, and every successive  
6 hearing, commenced these cases to run a sale process. We set  
7 up a strong process to maximize value that resulted already in  
8 the approval, and we're in the process of closing the hardware  
9 sale. And we're now on the precipice of hopefully obtaining  
10 approval of the digital sale so we can quickly consummate that.

11 The sale here is a clear exercise of the debtors'  
12 business judgment. While the circumstances of this hearing are  
13 somewhat unique, the results here are also very unique. We  
14 came here with a bid of \$900,000, and we now have a bid that's  
15 materially higher, from that same bidder, of \$1.5 million and  
16 the prospect of being able to close this sale very quickly.

17 That's particularly notable in light of the fact, as  
18 our witness testified, this business is not making money. It's  
19 costing the company money every day. And it'll take upwards of  
20 \$30 million to even hit break-even. No one was willing to  
21 invest in the company before bankruptcy and no one was willing  
22 to invest in the company after bankruptcy to fund that, and the  
23 sale is literally the only option that we have here.

24 We've fully complied with our obligations and duties  
25 under the bidding procedures order, and in -- to that end have



1 | been in regular contact with our creditors' committee, which I  
2 | understand fully supports our sale here, was present at the  
3 | auction, and has been consulted literally every day.  
4 | Mr. Sandler and Mr. Feinstein, both, and the rest of their team  
5 | for the, you know, better part of a week and a half here as  
6 | these more recent developments have come up.

7 |           So with that said, we don't have any further  
8 | argument. We're happy to take any questions that the Court  
9 | might have prior to seeking entry of bidding procedures order.  
10 | And with that, I'll stop.

11 |           THE COURT: Okay. Does anyone else wish to be heard?

12 |           UNIDENTIFIED: Your Honor --

13 |           MR. FEINSTEIN: Thank you, Your Honor. May I --  
14 | sorry.

15 |           THE COURT: I guess I ought to say anyone who  
16 | supports the relief requested wish to be heard? Anyone?

17 |           MR. FEINSTEIN: I guess that would be me, Your Honor.  
18 | Again, for the record, Robert Feinstein for the Committee. So,  
19 | Your Honor, we certainly agree with the observations Mr. Pesce  
20 | made. This is a difficult and painful situation because I  
21 | think it's clear that it -- had SPI been alerted to the sale  
22 | prospect before the auction, we might have had a spirited  
23 | auction, we might have had a better purchase price. And  
24 | that -- that's really unfortunate. But we also respect the  
25 | process and we respect that Augmedics had a right to rely on





1 the bid procedures order. And they went above and beyond the  
2 call of duty, in my opinion, because they didn't need to raise  
3 their bid from 900,000 to a million five. They could have  
4 stood pat and said, that was our -- announced as a winning bid,  
5 and they could have contested any effort to sell to another  
6 bidder.

7           They also could have appealed. And I don't want to  
8 minimize that prospect because the delay in the closing of the  
9 sale with an appeal, that occasion, would cause the estate to  
10 lose more money. And then there's the cost of the appeal  
11 itself, because you've got debtors' professionals, the  
12 Committee's professionals, charging the estate for the  
13 appellate process. And I know, again from the Line Tree  
14 (phonetic) experience that the disappointed late bidder  
15 there -- or disappointed original bidder appealed on a state  
16 pending appeal. There were a lot of proceedings.

17           So given that the increment here is 500,000, that  
18 could very easily be chewed up by operating losses, by  
19 professional fees associated with the appeal. It's also  
20 conceivable Augmedics would have made a claim for some kind of  
21 administrative expense, like a breakup fee, if they were  
22 disappointed in the process. So after synthesizing all those  
23 things and giving us a lot of careful thought, we come out  
24 where we are, which is supporting the sale to Augmedics for a  
25 million-five.



1 I did hear along the way, and I don't know if it's  
2 still operative, that SPI was prepared to be a backup bidder at  
3 1.3 million. That preceded their filing their new bid today  
4 (indiscernible). I don't know if that's still the case. It's  
5 always good to have a backup bidder. I mean, we did have a  
6 different backup bidder, I guess, at 850. We would like  
7 clarity on that.

8 But to be clear, Your Honor, we do support the sale  
9 to Augmedics at 1.5 million.

10 THE COURT: Thank you.

11 Mr. Martin, did you wish to speak?

12 MR. MARTIN: Yes, Your Honor. Just a few words, if  
13 you don't mind.

14 THE COURT: Sure.

15 MR. MARTIN: Again, like I said previously, we're not  
16 objecting to the relief requested, but we're not supporting the  
17 relief requested. We're still very much interested in the  
18 assets, but understand and appreciate the difficult position  
19 that this puts the debtors and the UCC in. But I hope that  
20 they can take solace that SCI's involvement in the process to  
21 date has provided value to the estate in at least \$600,000 in  
22 what we viewed as an increased bid. And despite the fact that  
23 Augmedics said that they would not be participating in any  
24 additional bidding, that at the last hearing there was another  
25 bid.



1 I also wanted to address the backup bidder issue. I  
2 would like some clarity from the Court on that, given the fact  
3 that under the bidding procedures, Brainlabs was the backup  
4 bidder, and I struggle to see how we could slide ahead of  
5 Brainlabs as the backup bidder if we couldn't bid against  
6 Augmedics as the primary bidder. So I'd like some clarity on  
7 that, whether it's even permissible for us to act as the backup  
8 bidder or not, but we're certainly willing and able to do so.  
9 That's all I have, Your Honor. And I appreciate your comments.  
10 Thank you.

11 THE COURT: No, thank you.

12 Okay. So does anyone else wish to be heard?

13 Okay. Before the Court is request for approval of  
14 the digital health business assets to Augmedics free and clear  
15 of all liens, claims, and encumbrances. This is a continuation  
16 of an emergency motion that was filed at Docket Number 26.  
17 There's been more than proper notice and service of today's  
18 hearing and service of the motion. This is a core proceeding  
19 under 28 USC 157(b)(2), the sale of assets. And Court has  
20 jurisdiction to enter under 28 USC 1334.

21 This motion was originally filed on June 19th. In  
22 connection with this motion, the Court approved bidding  
23 procedures, and there was an auction conducted in accordance  
24 with those procedures. Augmedics was declared the winner of  
25 the auction. Since the filing of that winning -- notice of the



1 winning bidder, another entity came through, Surgical  
2 Technologies and wanted to place a topping bid.

3 Let me just deal with the -- just basics and get back  
4 to first principles, which is always the Bankruptcy Code.  
5 Section 363 of the Bankruptcy Code authorizes -- well, we can  
6 say 363(b), authorizes the debtor with notice and a hearing to  
7 sell assets outside of the ordinary course of business. The  
8 standard to sell developed by courts, especially the one that  
9 this Court is bound by, is the concept of business judgment.  
10 Substantial deference is given to business judgment here.  
11 Right?

12 Obviously -- and just note, you know, the duty of the  
13 debtor, right, is to maximize the value of the estate. There  
14 was a bidding procedures set forth, and that process was  
15 intended to maximize the value of the estate. Therefore, in  
16 other words, if one follows the bidding procedures and a winner  
17 is declared, parties are provided notice of the sale, parties  
18 in interest who may have a -- you know, an interest in the  
19 assets because the assets were to be sold free and clear, to  
20 the extent that there were any, constitutional due process was  
21 provided to parties through notice.

22 But there's also a process, that is determined, if  
23 one follows that process, then therefore, one has essentially  
24 provided a -- you know, a runway for a debtor to follow and in  
25 their advisors to say that, you know, they've maximized the



1 value of the estate, they've done what they could. And that's  
2 what the debtor did here.

3 And there was an initial bid of \$900,000. There was  
4 an objection because there was a topping bid placed by  
5 Augmedics. And now -- the Court was not comfortable proceeding  
6 on that day. There were some bids, and I wanted to make sure  
7 that -- quite frankly, that the Committee had an opportunity to  
8 kind of be able to consult and provide some transparency to the  
9 process.

10 I would note, and I think Mr. Martin kind of  
11 correctly noted, you know, parties are entitled to notice of a  
12 hearing. Parties in interest are entitled to notice of a  
13 hearing. There is no really kind of -- you know, outside of  
14 the process that the Court has established, right, no one  
15 really has a right to buy the asset. But there's a process in  
16 place in which one can say they followed and are entitled to be  
17 declared the winner. And that's really kind of where Augmedics  
18 was.

19 And I certainly understand the role that Mr. Martin's  
20 clients played here and based upon the evidence -- and I want  
21 to make sure that I provide a clear record -- they've done  
22 nothing wrong. Mr. Martin has done nothing wrong. They  
23 weren't notified about the assets. And A&M did nothing wrong,  
24 right? It's -- there's always going to be someone who doesn't  
25 know about the process, and that's kind of what happened here.



1 And -- but the debtor did what it could to proceed with a  
2 higher bid, felt it was -- had a duty -- a fiduciary duty to do  
3 so.

4 I'm going to declare Augmedics as the winning bidder,  
5 and it's -- I'm only going to allow them to be declared the  
6 winner. I'm not going to declare a backup bidder.

7 I think, Mr. Pesce, if things don't close with  
8 Augmedics, then just come back really quickly with someone.  
9 And I think, you know, we can do that on less than 24-hours'  
10 notice. There's been notice that as to, you know, whether  
11 Mr. Martin's client will be the winner of that. And you can  
12 come in here really fast with me and that process can take care  
13 of because I'm not opening the auction back. I'm just going --  
14 there's -- if you've got something and it's high, then come  
15 into court with it.

16 But I'll just declare Augmedics as the winner. I  
17 think that the debtors have satisfied their business judgment,  
18 and I do believe business judgment has been established, and I  
19 do really want to make sure that -- you know, that the process  
20 has been followed. And sometimes I think this is one of the  
21 results of the process. But I do note a lot more money has  
22 come in into the door.

23 Everybody has done their job and I really appreciate  
24 it. This is what happens when you have high-end professionals.  
25 And so I don't think anyone was put in a difficult position. I



1 think the process -- you know, this happens from time to time  
2 and Augmedics is the winner today. You know, we'll see if they  
3 can close.

4 But based on everything that's before me, I think  
5 they're entitled to the protections of 363(m). And there's --  
6 I'm finding of no collusion under the 363(m). And I think  
7 debtors' counsel did their job and they're really good at it  
8 and I appreciate it. And I think the Committee has done  
9 exactly what it was supposed to do, and I appreciate them, and  
10 I appreciate the work that Mr. Martin did. I think everyone  
11 did what they were supposed to do.

12 Augmedics is the winner. They won the auction, and  
13 they put up more money now, and the debtor did what they were  
14 supposed to do. But I'm going to declare Augmedics as the  
15 winner, and I'll approve an order that way.

16 Mr. Pesce, I don't know if I need to sign an order.  
17 Kind of -- I don't know if I can just strip out the whole  
18 backup bidder piece. But I'm telling you, on less than -- on  
19 24-hours' notice, if something doesn't close, just come back  
20 and you pick the winner. You pick who you want to go with, and  
21 we're not going to get into kind of a -- you know, just --  
22 you're just going to come in and tell me who you want, and  
23 we'll go forward. And if it's Mr. Martin's client, that's  
24 completely fine with me. I feel comfortable with proceeding on  
25 that way.



1           And I appreciate the process that A&M ran and that  
2 the Committee was a consulting party. I'm comfortable with the  
3 process. And there's a lot of money that's coming into the  
4 estate, and so let's not lose sight of that either.

5           Mr. Pesce, let me ask you, does it make sense for me  
6 to sign or kind of -- you know, maybe I'd ought not do that,  
7 maybe? I don't know. Is it possible for me to kind of  
8 Isgurize the order? Or should I stay away?

9           MR. PESCE: I think the order we filed earlier today  
10 is -- you should be able to sign the order we filed earlier  
11 today. I don't think it has -- it doesn't have anything about  
12 Mr. Martin's backup bid. And we --

13           THE COURT: Okay.

14           MR. PESCE: We'll -- we, you know, understand your  
15 comments, and can act in that way if the unexpected occurs.

16           THE COURT: Alrighty. Very much appreciate  
17 everyone's time today, and I appreciate giving me a little  
18 patience with a little matter earlier today. Thanks for  
19 everyone. You all have a good day. Thank you.

20           MR. PESCE: Thank you, Your Honor

21           (Proceedings concluded at 2:34 p.m.)

22                                   \* \* \* \* \*

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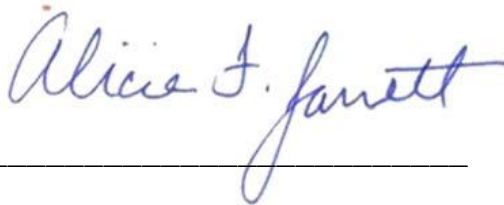
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C E R T I F I C A T I O N

I, Alicia Jarrett, court-approved transcriber, hereby  
certify that the foregoing is a correct transcript from the  
official electronic sound recording of the proceedings in the  
above-entitled matter.



ALICIA JARRETT, AAERT NO. 428

DATE: August 14, 2023

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